No. 627.

No. . October Term, 1898.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,

Brief of Prichard for Respondents

Supreme Court of the United States.

Filed Jan. 16, 1899.

EX PARTE JOHN ROEHM.

Answer of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading as Horst Brothers, to use, &c., to the Petition of John Roehm for a writ of *certiorari* requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court of the United States for its revision and determination, a writ of error taken by John Roehm.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Respondents.

Allen, Lane & Scott, Prs, Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The answer of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst respectfully shows:—

First.—Under the settled rule of this court as stated in Forsythe *vs.* Hammond, 166 U. S., 506, the writ of *certiorari* will only be granted when the circumstances of the case are such that "the importance of the "question involved, the necessity of avoiding conflict be-"tween two or more courts of appeal, or between courts of "appeal and the courts of a State, or some matter affecting "the interests of this nation in its internal or external rela-

"tion," demands the exercise of the power to issue such writs.

Second.—The ground urged by petitioner for the issuing of the writ is that the doctrine of anticipatory breach of contract, ordinarily known as the rule of Hochster *vs.* de la Tour (2 El. & Bl., 678), has never been affirmed by this court.

While this rule was not immediately acquiesced in by all the courts and gave rise to considerable discussion on both sides of the Atlantic, it has now been followed in so many cases, both in England and America, that it may be said to be a well-settled rule of commercial jurisprudence. There has been almost a unanimous adoption of it by the courts of the different States, and there is no conflict between the Courts of Appeals of the United States in regard to it. How completely the doctrine has been adopted by both State and Federal courts will be seen by the cases referred to and quoted in the brief for defendants in error in the Court of Appeals, which brief is annexed hereto as part of this answer.

Third.—If, however, the rule of Hochster *vs.* de la Tour could be considered as so doubtful and so important as to render it desirable that this court should pass upon it, the conclusive answer to the petition is to be found in the fact that the question is not involved in the present case.

The facts of the case were that plaintiff and defendant in 1893 made a five-year contract for the sale of hops, to be delivered in certain monthly installments in each season. For the convenience of the parties this one contract was embodied in the form of ten separate papers, all signed and dated contemporaneously, but each for one season's delivery.

After the contract had been carried out for three years, defendant refused to receive a shipment made under it, and positively declined to carry it out any further. The

case was not, therefore, one in which there had been an anticipatory breach before the time of performance commenced, but the ordinary case of a breach during performance, which gave the injured party the right to sue. In order that there may be no question as to this, reference is made to the following portions of the record:—

Testimony of John Roehm, the defendant (printed page 54):—

Q. In August, 1893, you made a five-years' contract for your hops at twenty-two cents per pound?

A. Yes, sir.

Q. At that time these four pieces of paper were signed, were they not?

A. Yes, sir.

Q. There were six other pieces of paper for the previous three years?

A. Yes, sir.

Opinion of Dallas, Circuit Justice, in refusing new trial (Record, printed page 30):—

I am still of opinion that the plaintiffs' right to compensation accrued at the time of the defendant's anticipatory breach of the several contracts, which were treated by the court, and correctly, I think, as constituting a single one.

Extract from opinion of Court of Appeals:—

In August, 1893, Paul R. G. Horst, E. Clement Horst and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific Coast hops, "to be delivered at various dates in the future, at an uniform price of twenty-two cents per pound. Of the whole quantity six hundred bales had been delivered, accepted and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. These were deliverable at the rate of twenty bales per month during each month from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months, or one season. They

all bear the same date, are similar as regard the quantity of hops to be delivered and the price to be paid; they differ only in the time of delivery and the year's crop from which delivery was to be made.

Upon these facts the question as to the adoption of the rule of Hochster *vs.* de la Tour does not arise. The breach complained of was not a breach before the time for performance had arrived, but the breach of an executory contract during the course of performance and after it had been partially executed. There is no conflict of opinion with regard to the right of immediate suit in such a case. In England the point is ruled by

Cort *vs.* Ambergate R. W. Co., 17 Q. B., 126,

and in this court repeated decisions have affirmed the rule.

In the case of

Lovell *vs.* St. Louis, &c., Ins. Co., 111 U. S., 264,

the court (Mr. Justice Bradley delivering the opinion) said:—

As the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he sustained thereby.

And the reason for the rule is well stated by Mr. Justice Brewer in the recent case of

Anvil Mining Co. *vs.* Humble, 153 U. S., 540-551,

as follows:—

Wherever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform. In other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.

The one reason urged by petitioner, viz., that the rule of Hochster *vs.* de la Tour should be expressly passed upon by this court, falls to the ground since the question is not involved in the present case.

It is submitted, therefore, that the case is not one for *certiorari* under the rule laid down in Forsythe *vs.* Hammond, already cited.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Respondents.